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## An Archeology of Law in Thailand

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Tom Ginsburg

## An Archeology of Law in Thailand\*

From the perspective of comparative law, Thailand is anomalous – a distinct case that is difficult to categorize, with many apparently paradoxical features. Like Japan, the country retained its political independence, navigating the storms of Western colonialism to modernize on its own terms after concluding a treaty with the British in 1855. To manage this process, it borrowed law and legal institutions on a massive scale, primarily from France, Germany and Japan, giving us a complex and layered set of legal institutions. The depth of penetration of the formal law, however, is sometimes quite shallow.

The political system, too, is *sui generis*. Notoriously unstable when it comes to formal constitutions, the basic political structure is organized around a conservative monarchy that has provided continuity for several centuries. Formally subject to constitutional limitations, this monarchy has drawn on Buddhist idiom to deploy a good deal of informal power. The overall picture is one of formal legality whose operation is underpinned by informal structures that are difficult to grasp.

Until now, Thailand's legal history has not been the subject of much scholarly attention in foreign languages. This book, jointly edited by Professors Andrew Harding and Munin Pongsapan, is an important corrective. With a set of fresh and diverse essays, contributed by a mix of established foreign scholars and younger scholars based in Thailand, the volume provides an essential reference for this important jurisdiction and marks a major development in Southeast Asian legal studies generally.

The book is organized roughly chronologically, beginning with the legal history of Siam before the country's intensive encounter with colonialism. Evidence for this period is scarce. Since the writing of Robert Lingat in the 1930s, it has always been assumed that Buddhist ideas of universal moral law, embodied in the *Thammasat*, have provided the major source of law, with royally promulgated

rules providing only interstitial norms. The *Thammasat* derived from the *dharmasastras*, Sanskrit texts of religious origin that were influential in South-east Asia. Lingat's characterizations placed natural law ideas at the center. In an important revisionist essay that begins Part I, Professors Chris Baker and Pasuk Phongpaichit take issue with this standard story, focusing on the famous Three Seals Code of 1805. They demonstrate that this document was a kind of assemblage of texts, borrowing material from neighboring jurisdictions, but also reflecting an older tradition of royal lawmaking in Siam. Law, in the Austinian sense of a sovereign command backed by force, clearly had a role to play from early on, even if European analysts tended to minimize its presence. Kongsatja Suwanapech follows with a history of the initial Royal Commands, statements given by Thai monarchs upon their ascension to the throne. The chapter illustrates how these have evolved over time to fit the political and idiomatic needs of particular kings. King Chulalongkorn (reign 1868–1910) drew on a Buddhist theory of the *Mahasommutiraj*, or Great Elected, which resonated with contemporary European ideas, while also providing a basis for absolutism. This theory proved useful in 1932 after the People's Party revolution ended the absolute monarchy in favor of a constitutional monarchy. Although that revolution formally placed the people in the position of being the source of power, the precise locus of sovereignty remains distinctly ambiguous today. In the design of Royal Commands, we observe the active construction of political legitimation by monarchs and their elite allies, seeking to limit popular sovereignty.

The remainder of Part I shows the continuing relevance of the early period for Thai legal culture today. Buddhist idiom retains a good deal of force, as shown by Khemthong Tonsakulrungruang in his chapter, an example of a growing scholarly project to call attention to the important but understudied category of Buddhist law. Eugénie Mérieau traces

\* ANDREW HARDING, MUNIN PONGSAPAN (eds.), *Thai Legal History: From Traditional to Modern Law*, Cambridge: Cambridge University Press 2021, 293 p., ISBN 978-1-108-83087-4

the history of Thailand's *lèse majesté* law, which has been a tool of repression deployed by a long series of military dictators. David Engel shows how the distinct legal consciousness of Northern Thailand survives and has been deployed in mass political demonstrations involving a »blood curse« ritual. The persistence of »traditional« ideas in Thai law is not only a story of society resisting modern legal norms of foreign origin, but of the active deployment of traditional idiom by elites seeking to preserve hierarchies. It is also a story of the public retaining ideas about karma, power and authority. Clearly, as William Faulkner famously said, »The past is never dead. It's not even past.«

Part II of the book focuses on foreign law influence during the period of high reform, after the signing of the Bowring Treaty with Great Britain in 1855. Individual chapters examine the laws of contract, trust, administration, family law, criminal law, and the treatment of Thailand under international legal standards of »civilization«. This section of the book illustrates the *bricolage* character of reforms. A particularly interesting example here is the chapter by Surutchada and Adam Reekie on the role of British judges in the Supreme Court of Siam in the early 20th century. Despite no formal treaty requirement to do so, Siam's legal system brought in numerous foreign advisers, who had a profound influence on the country's legal development. That British judges would be included is somewhat surprising, given that most of the original legal borrowings were from civil law jurisdictions such as France and Japan. British judges sitting on the Supreme Court decided many cases, despite the fact that they »had no more experience of interpreting and applying a civil law code than the Siamese judges with whom they were sitting« (115). The judges left their mark through precedential types of reasoning and their application of the common law institution of the trust. The encounter is somewhat paradigmatic of Thailand's strategy for retaining independence through law: the country played one foreign power off against another and drew influences from a variety of sources without a strict orthodoxy.

Part III brings the story to the contemporary period, the unstable cycles of constitutional change that have persisted since the 1932 revolution. As Rawin Leelapatana writes, this period has been one of a quest for a »nirvana« of a stable constitutional order, something that has not materialized. The political cycles of coups followed by weak democratic governments have persisted, and yet one also sees conceptual and institutional evolution. As Duncan McCargo notes in his chapter, beginning in the early 1990s judges were increasingly called in to resolve political disputes, a phenomenon which continued into this century. Political violence and coups have also been normalized in a legal sense, as Tyrell Haberkorn's chapter on amnesties shows.

Why should a non-specialist be interested in the legal history of this midsize country in Southeast Asia? The successful deployment of Western law by elites to retain freedom of maneuver in an era of colonialism is illuminating for understanding societies which were not so successful. The creative work of political and legal elites to create hybrid concepts suggests much more agency for non-Western subjects than the focus on colonialism might indicate. As in many other countries, we observe a lingering disjuncture between formal law and lived experience, but Thailand offers a distinctly Buddhist context to view these interactions. This might contribute to a richer understanding of how religion and law interact than the literature on majority Muslim and Christian societies has presented us with.

Andrew Harding, in other work quoted by Peter Leyland in his chapter on administrative justice, has characterized law in Southeast Asia using a geologic metaphor, with layers put on top of each other without actually replacing what is below (195–196). Sometimes, the lower layers are still visible, even if not easy to distinguish from each other. The archeology of these layers in Thailand is a project now coming to fruition, for which we can be grateful.

